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IN THE
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OCTOBER TERM, 1990

DANIEL L. MEDLOCK, *et al.*,
Petitioners,
v.

JAMES C. PLEDGER,
COMMISSIONER OF REVENUES, *et al.*,
Respondents,

CITY OF FAYETTEVILLE, ARKANSAS,
Intervenor.

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF OF AMICI CURIAE THE CITY OF NEW YORK, THE NATIONAL LEAGUE OF CITIES AND THE UNITED STATES CONFERENCE OF MAYORS IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICI

The City of New York is the nation's largest municipal cable television franchising authority. It has been involved in franchising and regulating cable television systems since 1964. The City has in place ten franchises for cable television systems, which have the potential of serving over two million households. The National League of Cities represents more than 16,000 cities and towns across the nation. The United States Conference

of Mayors represents the more than 800 mayors of cities with populations exceeding 30,000 residents.

Amici are concerned with the potential impact of the Court's decision on the ability of franchising authorities nationwide to regulate cable television—and, in particular, their ability to ensure that the public receives fair compensation from cable operators who make substantial use of valuable public resources. Amici therefore submit this brief in support of Respondents, urging that the Court uphold the constitutionality of the Arkansas sales tax insofar as it applies to the sale of cable television services.

SUMMARY OF ARGUMENT

It is well-established that: "Different communications media are treated differently for First Amendment purposes." *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986) (Blackmun, J., concurring) ("*Preferred*"); *accord*, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386 (1969). Consistent with that principle, governmental authorities have been permitted to establish different regulatory requirements for various media. Likewise, a taxing authority may impose different tax requirements on communications media, where such requirements are not content-related and are rationally related to differences in the media themselves.

The Court has not specifically delineated the First Amendment standards applicable to cable. *See Preferred*, 476 U.S. at 495-96 (record insufficient to determine whether, under the First Amendment, cable operators may be regulated more like newspapers than conventional broadcasters). However, federal, state and local governments historically have regulated cable in a manner different than newspapers, magazines and other communications media—an approach that Congress explicitly endorsed and clarified in the comprehensive Cable Communications Policy Act of 1984, Pub. L. No.

98-549, 98 Stat. 2779 (codified at 47 U.S.C. §§ 521-599 (Supp. II 1984)) ("Cable Act"). *See generally City of New York* v. *FCC*, 486 U.S. 57 (1988); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691 (1984); National Telecommunications and Information Administration, *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations* at Appendix C (Regulation of Cable Television) (June 1988).

A principal basis for such different regulatory treatment is that cable, unlike newspapers and magazines, makes substantial commercial use of public resources. Cable operators obtain from state and local governmental authorities important benefits in the form of non-transient and disruptive access to public rights-of-way and the exercise of eminent domain powers. Such governmental benefits, which are made available to cable operators at non-market clearing prices, have the effect of affording virtually every cable operator a natural monopoly for the sale of cable services to the public. Newspapers and magazines do not receive any comparable benefits from state and local authorities.

There is nothing in the First Amendment or in the decisions of the Court that prohibits governmental authorities, in determining cable's tax treatment, from taking account of the significant governmental benefits that are accorded cable operators. It is perfectly reasonable for a governmental authority to determine that, in light of such benefits, cable should not be extended the same tax subsidies accorded newspapers and magazines—communications media that do not make comparable use of public resources and do not compete with cable in any meaningful way. The fact that cable operators may pay "franchise fees" (which are authorized by, and subject to the five percent cap set forth in, the Cable Act) does not preclude a taxing authority's consideration of the preferential treatment already afforded cable. Congress, in fact, recognized in the Cable Act that state and local

governments could impose generally applicable sales, entertainment and utility taxes on cable in addition to requiring payment of franchise fees.

Amici agree that the present case does not require the Court to delineate cable's First Amendment status. *See* Brief for Petitioners Daniel L. Medlock et al. at 19 ("Cable Pet. Br."); Brief of the National Ass'n of Broadcasters et al. at 4-7; Brief of the National Cable Television Ass'n at 24 n.16 ("NCTA Br."). The Court need not resolve in this case the issues that it left open in *Preferred*; indeed, the record here is not directed to the questions that the Court raised in *Preferred*. However, it is clear (as the trial court concluded) that cable's "use of public property, . . . along with the distinct and unique benefits gained by cable from use of that property, distinguishes . . . cable television from other communications media." Pet. for Writ of Certiorari at 19a ("Petition"). That distinction provides a constitutionally permissible basis for not according cable the same tax subsidies accorded print media.

ARGUMENT

THE FIRST AMENDMENT DOES NOT REQUIRE STATE AND LOCAL AUTHORITIES TO ACCORD CABLE TELEVISION OPERATORS THE SAME TAX SUBSIDIES AS NEWSPAPER AND MAGAZINE PUBLISHERS

This case involves a challenge under the First Amendment to an Arkansas law that extended the State's general sales tax to the sale of cable television services. The question presented is whether Arkansas must exempt cable operators from the sales tax simply because newspaper and magazine publishers receive such an exemption.

The Arkansas sales tax applies to various services and tangible goods. All of the State's cable operators pay the same tax, without regard to their size or the nature of

the programming that they offer. In addition, the tax is imposed equally on all those who, like cable television operators, charge the public for the right to view video programming—video store owners; movie theaters; and "any and all other[s engaged in the] distribution of television, video or radio services with or without the use of wires provided to subscribers or paying customers or users . . . ." Ark. Code Ann. § 26-52-301(3)(D), *as amended by* Act 769 of 1989 (*reprinted in* Petition at 24a). The sales tax also is imposed on water, gas and electric utilities which, like cable systems, make permanent use of the public rights-of-way.

The Arkansas tax applies to the fees that cable operators receive from their subscribers, but not to any other cable revenue. For example, the tax is not imposed on the revenue that cable operators derive from the sale of advertising (*see* NCTA Br. at 9 concerning the significance of cable advertising)—just as it is not imposed on the advertising revenue of newspapers, magazines or conventional radio and television broadcast stations. Cable operators also receive fees from those who purchase time to air particular programming on cable systems. The Arkansas sales tax is not imposed on that revenue—just as it is not imposed on the revenue that conventional broadcasters receive from those who purchase air time on their stations.

Petitioners Daniel L. Medlock et al. ("Cable Petitioners") nevertheless claim that the Arkansas law is impermissibly "discriminatory" because it exempts from taxation the sale of newspapers and magazines. Under their view of the First Amendment, such an exemption precludes the State from taxing the sale of cable services. Indeed, they suggest, it precludes levying the tax on the sale of any tangible good or service that includes speech protected by the Constitution. Their position, if accepted, would require governmental authorities to afford the identical tax treatment to every First Amendment communi-

cator, regardless of whether the medium of communication is a cable service, a radio station, a billboard, a fax machine or a tangible item (such as a newspaper or, for that matter, a T-shirt that contains some political message or a carton of Ben & Jerry's ice cream urging consumers to "Support Farm Aid" and to "Save Family Farms").[1]

As discussed below, the decisions of this Court in *Minneapolis Star* and *Ragland* (upon which Cable Petitioners rely) cannot properly be stretched to require that cable operators receive the identical tax exemptions accorded newspapers and magazines.[2] Moreover, Cable Peti-

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[1] Cable Petitioners contend that the identical tax treatment must be afforded all "members" of the print and electronic media. The Arkansas tax does treat cable operators the same as conventional radio and television broadcasters. Conventional broadcasters derive their revenue from the sale of air time to advertisers and programmers; as noted above, none of that revenue is subject to the Arkansas sales tax. In like fashion, none of the revenue that cable operators derive from the sale of advertising and other time is subject to the tax. Surely, the Constitution does not require Arkansas to devise a new taxation scheme to account somehow for the fact that cable operators have a source of income (subscriber fees) that conventional broadcasters do not enjoy; nor should Arkansas be required to impose its sales tax on broadcasters (who provide programming free-of-charge to the public) as a precondition to imposing that tax on cable operators (who sell such programming to the public). The Arkansas law also was amended in 1989 to bring within its ambit in-state distributors of satellite programming. Amici thus focus in this brief on the contention that cable must be taxed the same as the print media, specifically newspapers and magazines.

[2] *See Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) ("*Minneapolis Star*") (holding unconstitutional a Minnesota "ink and paper" tax imposed on the state's largest newspapers; evidence demonstrated that only 11-13 newspapers were subject to tax, and that only two newspapers paid the vast majority of the tax); *Arkansas Writer's Project, Inc.* v. *Ragland*, 481 U.S. 221 (1987) ("*Ragland*") (holding unconstitutional the Arkansas sales tax insofar as it applied to certain special

tioners' extreme view of the First Amendment is inconsistent with other decisions of this Court, including *Regan* v. *Taxation with Representation*, 461 U.S. 540 (1983) ("*Regan*") (which Cable Petitioners do not mention), and with accepted First Amendment principles.[3] Before addressing the appropriate First Amendment analysis, we discuss 1) those considerations that set cable well apart from the print media for purposes of taxation; and 2) Congress' determination in the Cable Act concerning the taxes and other fees that may be imposed on cable.

I. Unlike Newspaper And Magazine Publishers, Cable Operators Make Extensive And Disruptive Use Of Valuable Public Resources. Governmental Authorities May Properly Take Account Of Such Differences In Choosing Not To Extend To Cable Operators A Tax Exemption Granted Newspaper and Magazine Publishers

It is clear that the "activities" of cable operators "implicate First Amendment interests." *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("*Preferred*"). It is equally clear, however, that:

> "Differences in the characteristics of new media justify differences in the First Amendment standards applied to them."

Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 386 (1969). Thus, the Court in *Preferred* declined to rule on whether cable was entitled to the same First Amendment protection as the print media until a further record concerning the differences between cable and the print media

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interest magazines and not to general interest magazines; evidence demonstrated that only three magazines were subject to the tax).

[3] In *Regan* the Court upheld against First and Fifth Amendment challenges a federal law that granted tax exempt status to one group engaged in First Amendment activities but not to other such groups.

had been developed. Justice Blackmun, in a concurring opinion joined by Justices Marshall and O'Connor, explained that: "Different communications media are treated differently for First Amendment purposes." *Preferred*, 476 U.S. at 496; *accord*, *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 557 (1975) ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."); *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring); *id.* at 96 (Frankfurter, J., concurring).

Cable Petitioners and their supporting amici claim that cable systems are "similarly situated" to newspapers, magazines and other communications media and thus are entitled, under the First Amendment, to equal tax treatment with such media. Their descriptions of the media significantly exaggerate the extent to which cable may be compared fairly to newspapers and magazines.[4] More

[4] A cable operator may choose to carry certain programming services from a variety of those that are available—but there ends the operator's "editorial discretion." Unlike the newspaper or magazine publisher, the cable operator assumes no responsibility for reviewing or editing the overwhelming majority of material that it retransmits to the public; the programming service, and not the cable operator, assumes that responsibility. *See Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 707 (1984). The cable operator thus functions more like a drug store owner that chooses the particular newspapers and magazines to sell, rather than the publisher of such material. *See generally* Brenner, *Cable Television and the Freedom of Expression*, 1988 Duke L.J. 329, 336-43 ("Brenner"); Barron, *On Understanding The First Amendment Status of Cable; Some Obstacles In The Way*, 57 G.W.U.L. Rev. 201, 211 (1989). While even that activity warrants First Amendment protection, it does not support the claim that cable is constitutionally entitled to the same tax treatment as newspapers and magazines.

As for original material (the heart of a newspaper), the vast majority of cable systems simply do not have the resources to produce their own local programming. Indeed, nearly 75 percent of the cable systems in the United States have fewer than 5,000

importantly, however, by narrowly focusing on similarities that cable shares with all First Amendment communicators, Cable Petitioners fail to give adequate attention to the significant differences between cable and the print media—differences that historically and under the federal Cable Act have supported a different regulatory scheme for cable than for other media.

A principal difference is that cable operators receive from governmental authorities substantial commercial benefits that are not accorded newspapers and magazines. Such benefits fully justify a governmental authority's decision not to grant cable the same tax subsidies that are available to the print media.

In order to gain access to its paying subscribers, cable operators must make substantial use of valuable public property. Coaxial cable must be hung from utility poles, housed in underground utility ducts or otherwise placed in or across the public rights-of-way. Furthermore, cable operators necessarily depend upon state and local authorities to exercise their powers of eminent domain in order to ensure cable's access to private property. *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (*"Loretto"*). The grant of a cable franchise by

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subscribers. 1990 Television and Cable Factbook at C-385. *See also* Cable Pet. Br. at 6 (average cable system in Arkansas has approximately 4,300 subscribers); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979) (striking down FCC rule that required cable systems with more than 3,500 subscribers to originate a small amount of programming). While the nation's largest cable system with 535,000 subscribers may have its own news channel, NCTA Br. at 8, this is the rare exception. *See also id.* ("dozens" of cable operators may insert some local news in the CNN service, but there are nearly 10,000 cable systems in the United States). Local programming is most often available only on access channels, over which cable operators have no editorial control. *See* Cable Act §§ 611(e) & 612(c)(2), 47 U.S.C. §§ 531(e) & 532(c)(2).

As one commentor has correctly observed, *cable "operators' speech interests appear relatively lightweight . . . ."* Brenner, 1988 Duke L.J. at 331 (emphasis added).

a franchising authority carries with it the right to make the necessary use of public property and easements. Cable Act § 621(a)(2), 47 U.S.C. § 541(a)(2). Such grant allows the cable operator to obtain, at one time and at non-market clearing prices, all the necessary rights to reach that operator's subscribers—rights that are particularly valuable because they might otherwise be "impossible to negotiate individually." Brenner, 1988 Duke L.J. at 345-46. Furthermore, the grant of even a non-exclusive cable franchise by a franchising authority typically has the effect of according the cable operator a natural monopoly over the provision of cable services in its community.[5]

No newspaper or magazine receives any comparable benefits from local or state governments. To be sure, newspapers and magazines make transient use of public rights-of-way. But that use is not comparable to the permanent use that cable seeks. The difference was implicitly recognized by the Court in *Loretto*, when it held that a state statute affording cable access to private prop-

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[5] The cable industry obviously attaches significant value to the grant of the franchise. *See, e.g., Tele-Communications, Inc.* v. *Commissioner*, No. 268-89 (T.C. Nov. 7, 1990), 1990 WL 170429 (Tax Court) (sustaining claim by nation's largest operator of cable systems that, for depreciation purposes, cable franchise represents approximately 40 percent of the value of the purchase price of certain cable systems). Tele-Communications, Inc. successfully argued in that case that a cable operator enjoys a natural monopoly as a result of being awarded a franchise. The Tax Court agreed, noting that: "[E]ven if a local government wanted a second cable television company to construct another system for purposes of competition, it is extremely unlikely that another operator would enter the market when the return on the investment simply would not justify the expenditure." *Id.*, 1990 WL 170429; *see also* H.R. Rep. No. 682, 101st Cong., 2d Sess. 42 (1990) (less than one percent of communities in the United States have more than one cable system); *Central Telecommunications, Inc.* v. *TCI Cablevision, Inc.*, 800 F.2d 711, 713-17 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982).

erty constituted a "taking." Quoting from a case that involved a telegraph company's occupation of public rights-of-way, the Court noted:

> "'*The use which the* [*telegraph company*] *makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public* . . . . Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of highway and personal travel, wholly lost to the public . . . .'"

Loretto, 458 U.S. at 428-29, *quoting St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92, 98-99 (1893) ("*Western Union*") (emphasis added). Moreover, there are physical and aesthetic burdens involved in the construction and continual maintenance of cable systems. Such inevitable disruptions of the public order also distinguish the use that cable makes of public property from that made by newspapers and magazines.[6]

Because cable operators derive substantial commercial benefits from the use and disruption of public property and the exercise of public authority, there should be no question that the public deserves adequate compensation. As the Court in *Loretto* noted:

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[6] *See Preferred*, 476 U.S. at 493. "The distinction between newspapers and cable becomes especially clear when considered in light of the impact of each upon the public domain." Note, 53 Tenn. L. Rev. 179, 194 (1985), *citing Community Communications Co.* v. *City of Boulder*, 660 F.2d 1370, 1377 (10th Cir. 1981) ("To disseminate information, a newspaper need not use public property in the same way that a cable operator does. A newspaper may reach its audience simply through the public streets or mails, with no more disruption to the public domain than would be caused by the typical pedestrian, motorist, or user of the mails. But a cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys, and other public ways."), *cert. dismissed*, 456 U.S. 1001 (1982).

> "'It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, *the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated.*'"

Loretto, 458 U.S. at 429, *quoting Western Union*, 148 U.S. at 101-102 (emphasis added). *See also Preferred Communications, Inc.* v. *City of Los Angeles*, No. CV 83-5846 (CBM) (Bx), slip op. at 12 (C.D. Cal. 1990) (it would be "unreasonable to assert that a commercial cable operator should be permitted to profit from public rights of way without compensating the public for the enjoyment [of] those rights simply because their enterprise involves certain First Amendment protections").

Cable Petitioners contend that the public receives adequate compensation from the "franchise fees" which are authorized by, and subject to the cap set forth in, Section 622 of the Cable Act, 47 U.S.C. § 542. As discussed below, Cable Petitioners have mischaracterized the nature and purpose of franchise fees. More importantly, the payment of such fees does not preclude a taxing authority from taking account of the valuable governmental benefits already accorded cable; a state or local government may reasonably conclude that, in light of such benefits, it will not provide cable a further subsidy in the form of an exemption from a generally applicable sales tax.

II. Congress In The 1984 Cable Act Properly Balanced Cable Operators' First Amendment Interests. The Balance Struck By Congress Contemplates That Governmental Authorities May Impose Upon Cable Operators Taxes That Are Inapplicable To Newspaper And Magazine Publishers

The Cable Act represents Congress' effort to establish, for the first time, a comprehensive national policy for dealing with cable television. *See generally City of New*

York v. *FCC*, 486 U.S. 57 (1988). A principal objective of the Cable Act was to set forth "guidelines for the exercise of Federal, State and local authority with respect to the regulation of cable systems." 47 U.S.C. § 521(3). In "firmly establish[ing] the authority at each level of the government," H.R. Rep. No. 934, 98th Cong., 2d Sess. 24 (1984) ("Committee Report"), Congress was called upon to balance a number of different and often conflicting considerations with regard to a wide range of issues. Congress sought to achieve its objective mindful of the need to protect "cable operators' First Amendment interests." *Id.* at 36.

Congress responded to the conflicting interests by authorizing the FCC and franchising authorities to regulate cable in a number of respects that plainly differentiate cable from newspapers.[7] Among other things, Congress authorized state and local governments to grant and to renew cable franchises; to establish requirements for access channels; to regulate cable rates in circumstances defined by the FCC; to require that cable operators provide certain services, facilities and equipment; to estab-

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[7] The relationship between the Cable Act and cable operators' First Amendment rights was summarized by one cable attorney as follows: "[T]he nature of the relinquishments that the cable industry yielded up seems clearly to mark a concession by cable that it stands somewhere below newspapers on the publishing ladder." Schildhause, *Preferred Communications: Preamble to Breakup of Local Cable Franchising*, 7 Pace L. Rev. 1, 23 (1986).

The fact that Congress in the Cable Act has treated cable differently than the print media does not, of course, prevent the Court from reaching a contrary determination under the Constitution. However, as the Court noted in a related context, "The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment." *CBS Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103 (1973); *see also id.* at 102-03 (in evaluating First Amendment claims, Court does not "defer" to Congress but does "afford great weight to the decisions of Congress and the experience of the [Federal Communications] Commission"); Brenner, 1988 Duke L.J. at 383-84.

lish customer service and construction-related requirements; and to adopt technical standards not inconsistent with FCC standards. In addition, Congress specifically authorized franchising authorities to collect cable television "franchise fees." Cable Act § 622(a), 47 U.S.C. § 542(a). Congress set a five percent cap on the amount of such fees.[8] It made clear, however, that taxes such as the Arkansas sales tax at issue here are not "franchise fees" and, therefore, are not counted toward the five percent cap.

Congress did so by defining the term "franchise fee" as including "any tax, fee or assessment of any kind" imposed upon cable operators "*solely* because of their status as such." Cable Act § 622(g)(1), 47 U.S.C. § 542(g)(1) (emphasis added). It also said that the term does *not* include "any tax, fee, or assessment of *general applicability* (including any such tax, fee or assessment imposed on both utilities and cable operators or their services but not including a tax, fee or assessment which is unduly discriminatory against cable operators or cable subscribers) . . . ." Cable Act § 622(g)(2)(A), 47 U.S.C. § 542(g)(2)(A) (emphasis added). The Committee Report explains that a tax of "general applicability" (not subject to the 5 percent cap) includes:

> "such payments as a *general sales tax, an entertainment tax imposed on other entertainment businesses as well as the cable operator, and utility taxes or utility user taxes* which, while they may differentiate the rates charged to different types of utilities, do not unduly discriminate against the cable operator so as to effectively constitute a tax directed at the cable system."

Committee Report at 64 (emphasis added).

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[8] Section 622(b) of the Cable Act, 47 U.S.C. § 542(b), provides that: "For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system should not exceed five percent of such cable operator's gross revenues derived in such period from the operation of the cable system."

Congress did not break new ground in this definition; it effectively codified existing FCC policy. The FCC had previously ruled that utility taxes imposed on cable operators are not cable "franchise fees"—even though such taxes, by definition, are not imposed on newspapers, radio or television. *Sammons Communications, Inc.*, 61 F.C.C.2d 452 (1976). Likewise, the Commission had concluded that state sales and use taxes are not "franchise fees"—even though newspapers, radio and television may be exempt from such taxes. *Memorandum Opinion and Order in CSR-479*, 50 F.C.C.2d 540 (1975). *See also Memorandum Opinion and Order in Docket 20018*, 49 F.C.C.2d 1078, 1084 (1974) ("We have not preempted the field of state or local taxation of cable television, nor do our franchise fee limitations [§ 76.31(b)] apply to the normal taxes imposed by cities and states on cable operators doing business or owning property in their taxing jurisdiction.").

In short, Congress concluded in the Cable Act that it is entirely appropriate for governmental authorities to impose a franchise fee on cable operators solely because of their status as such. Congress did place a limit on the amount of the franchise fee that could be charged. However, it arrived at a five percent cap, recognizing that governmental authorities would derive additional revenues from cable operators in the form of general sales, utility, entertainment and comparable taxes which are not directed solely at cable (*e.g.*, the Arkansas sales tax).[9]

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[9] When the Cable Act became law in 1984, several states imposed on cable operators various taxes from which newspapers were exempt. For example, revenue from cable television service was subject to a sales tax in South Dakota. *Opinion of the Attorney General* (South Dakota), No. 74-28, July 11, 1974. Florida and Wisconsin taxed both cable installation and service. *American Video Corp.* v. *Lewis*, 389 So. 2d 1059, 1061 (Fla. Dist. Ct. App. 1980); Wis. Gen. Sales and Use Tax Law §§ 77.52(2)(a)12 (1989), as added by Ch. 317, Laws 1975. Courts in New Jersey and New

III. Under The Decisions Of The Court Construing The First Amendment, Governmental Authorities May Exempt Newspaper and Magazine Publishers From A Generally Applicable Sales Tax Without Extending That Subsidy To Cable Operators

Cable Petitioners place principal reliance upon the Court's decisions in *Minneapolis Star* and *Ragland*. Neither decision, however, provides a proper basis for requiring the same tax treatment of cable, on the one hand, and newspapers and magazines, on the other hand. Rather, the Court's decision in *Regan* recognizes that a legislature may, in appropriate circumstances, exempt from a general tax one group that exercises First Amendment rights while not exempting another such group. A content-neutral exemption such as that provided newspapers by the Arkansas statute is not only consistent with fundamental First Amendment principles; it also furthers the goals of the First Amendment.[10]

York also determined that the installation of cable service was taxable. *New Jersey State Tax News*, Division of Taxation, January/February, 1983; *In the Matter of the Application of Amherst Cablevision, Inc.*, State Tax Commission, September 14, 1980 (TSB-H-80) (208) S, Sales Tax, November 18, 1980, 1980 WL 6992 (N.Y. Dept. Tax Fin.). Indiana and Ohio courts held that equipment used to produce and transmit cable television signals was taxable. *Ind. Dept. of St. Rev., Etc.* v. *Cable Brazil, Inc.*, 177 Ind. App. 450, 380 N.E.2d 555, 558 (Ind. App. 1978); *T.V. Antenna Systems, Inc.* v. *Bowers*, Ohio BTA, No. 44357, April 11, 1961. Indiana's Code provided for a sales tax on cable television service, as well. *Ind. Dept. of St. Rev.* v. *Cable Brazil, Inc.*, 177 Ind. App. 450, 380 N.E.2d 555, 558 (Ind. App. 1978).

[10] Cable Petitioners also rely on various state court decisions. However, no state court, other than those below, has considered whether a sales or comparable tax may be imposed on the sale of cable services if not also imposed on the sale of newspapers and magazines. All but two of the decisions cited by Cable Petitioners deal with the issue reserved in *Ragland*—i.e., tax treatment of magazines and newspapers; the remainder deal with the tax treatment of newspapers and conventional broadcasting.

A. The Court in *Minneapolis Star* invalidated on First Amendment grounds a Minnesota tax imposed on the ink and paper purchased by the state's largest newspapers. The Court found that the discrimination took two different forms: 1) it singled out newspapers among all enterprises for a special tax; and 2) it targeted a small group of newspapers to pay that tax (less than four percent of all the state's newspapers were actually subject to the tax). The Court held that such discriminatory taxation could not stand absent "an overriding governmental interest." 460 U.S. at 582-83.

Neither form of discrimination is present here. The Arkansas tax is a sales tax of general applicability which applies to a broad range of goods and services. *See* 460 U.S. at 581, 588 n.9 (suggesting that Minnesota could have constitutionally applied its general sales tax to newspapers). Furthermore, it applies uniformly to all cable operators and, indeed, to all those who (like cable operators) sell video programming to the public. *See* pages 5-6 *supra*. Such a broad-based, content-neutral statute poses little risk of the illicit government intent or distortion of ideas inherent in the Minnesota tax. 460 U.S. at 591-92.[11]

The Court in *Minneapolis Star* explained that differential tax treatment may be "justified by some special characteristic of the press . . . ." 460 U.S. at 585. Precisely such a justification exists with regard to cable. Unlike newspapers and magazines, cable operators receive substantial governmental benefits through use of public

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[11] The Court in *Minneapolis Star* expressed its suspicion that the targeting of small segments of the press is really a guise for content discrimination, by reference to its decision in *Grossjean* v. *American Press Co.*, 297 U.S. 233 (1936). In that classic case of content-based taxation, the Court explained, the Louisiana government deliberately attempted to silence the expression of the largest state newspapers because they had "ganged up" against Senator Huey Long. 460 U.S. at 579-80, *referring to Grossjean*, 297 U.S. at 250-51.

resources. *See* pages 9-11 *supra*. The State of Arkansas is fully justified in choosing not to accord cable any further subsidy in the form of a tax exemption granted newspapers and magazines.

B. The Court in *Ragland* invalidated the Arkansas sales tax insofar as it applied to sales of general interest magazines and not to "religious, professional, trade and sports journals." The Court found that, as in *Minneapolis Star*, the Arkansas tax impermissibly singled out a "small group" within the press for special taxation —specifically, only three publications. 481 U.S. at 228. The Court noted that the "burden of the tax" rested upon a very narrow grouping of publishers, 481 U.S. at 229 n.4, which might indicate that the distinctions drawn were content-based. Again, no such "small group" is singled out by the Arkansas tax as it applies to cable operators and others who sell video programming.

Moreover, the Court in *Ragland* found particularly "disturbing" the fact that the state had differentiated among magazines solely on the basis of content—i.e., in order to determine whether the magazine was exempt from taxation, state officials had to consider whether the magazine was devoted solely to religious, professional, trade or sports issues. 481 U.S. at 230. The Arkansas sales tax, insofar as it applies to the sale of all cable services, contains no such content-based discrimination. Nor is there any real danger of content-based discrimination where, as here, an entire medium of communications is subject to a particular tax.

Cable Petitioners state that the instant case "simply presents the vehicle for this Court to answer the question it reserved in [*Ragland*]." Cable Pet. Br. at 19. But that statement is incorrect. The Court in *Ragland* reserved the question of whether "a distinction *between different types of periodicals* [i.e., newspapers and magazines] presents an additional basis for invalidating the sales tax, as applied to the press" (481 U.S. at 233

(emphasis added))—not whether periodicals must be taxed the same as a different communications medium (cable television).

C. In focusing on *Minneapolis Star* and *Ragland*, Cable Petitioners have overlooked *Regan*. The Court in *Regan* upheld an internal revenue statute which generally denied tax exemptions for organizations engaged in lobbying, though veterans' organizations received a tax exemption regardless of lobbying activities. The Court stressed the long-standing principle that "a legislature's decision not to subsidize the exercise of a fundamental right *does not infringe* the right, and thus is not subject to strict scrutiny." 461 U.S. at 549 (emphasis added). The Court found that the tax statute satisfied the general rule that statutory classifications must "bear a rational relation to a legitimate governmental purpose," and held the tax to be valid. *Id.* at 547, 549-51.

Like the statute in *Regan*, the Arkansas statute taxes two distinguishable groups of speakers differently, but does not prevent any group from exercising its First Amendment rights. As in *Regan*, the Arkansas legislature has not distinguished between media groups on the basis of the content of their speech; nor is there any indication that application of the tax statute would suppress any particular ideas. *See* 461 U.S. at 546, 548. The legislature merely seeks to fulfill its obligation to "fit [its] tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden." *Id.* at 547, *quoting Madden* v. *Kentucky*, 309 U.S. 83, 87-88 (1940). Given the substantial use of public resources by cable companies, there is a strong, rational basis for the Arkansas legislature's decision not to provide a further subsidy to cable.

D. The Arkansas sales tax does not threaten First Amendment interests. *First*, the tax is not content-based, and does not suppress any particular point of view. By exempting one medium while imposing a tax

on the entirety of another medium, the statute does not provide an advantage to any side in a debate. The medium of cable television is not Democratic or Republican, not liberal or conservative. Rather, as Cable Petitioners allege, cable television transmits a broad spectrum of views and information. Thus, even if a government tax on cable television services but not on newspapers and magazines favors the print medium, the tax does not create a distortion in the political process or increase the risk of political extremism.[12] Nor does the statute threaten the "search for truth," another core concern of the First Amendment. *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 781 (1976) (*"Bellotti"*).

Second, a tax on cable television does not result in a discriminatory or lesser degree of First Amendment protection for cable, because the taxed medium is not in direct competition with any tax-exempt or subsidized groups. Cable television and newspapers are not substitutes in any meaningful consumer sense.[13] Therefore, the demand for cable television compared to newspapers may be essentially inelastic, i.e., an individual will not likely turn from cable television to newspapers simply

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[12] *See Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1972) ("above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . government must afford all points of view an equal opportunity to be heard"); Note, *Content Regulation and the Dimensions of Free Expression*, 96 Harv. L. Rev. 1854, 1865-66 (1983) (First Amendment protects the community's fundamental interest in "expression relating to self-government").

[13] Relying on statements contained in three newspaper articles, NCTA claims that there is "significant competition" between cable and newspapers; such competition, says NCTA, provides a "further indication of the close parallels, for First Amendment purposes," between cable and newspapers. The FCC, however, has squarely rejected the unsupported notion that cable and newspapers engage in any significant competition. FCC, *Report in MM Doc. No. 89-600* at pp. 35-36 (1990).